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No. 97-1895

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

MARY McCARTHY, et al.,

Petitioners,

v.

PROVIDENTIAL CORPORATION, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Motion of Stephané Bourchier De Carbon, Société Civile De Gestion Des Actions De Carbon, and Seacoast Motors of Salisbury, Inc. To File Brief *Amicus Curiae* Out of Time and Brief *Amicus Curiae*

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RULE 29.6 DISCLOSURE

Amici have no parent companies or nonwholly owned subsidiaries.

MOTION TO FILE BRIEF *AMICUS CURIAE* OUT OF TIME

Stephane Bourchier De Carbon *et al.* and Seacoast Motors of Salisbury, Inc. respectfully move for leave to file this Brief *Amicus Curiae* out of time. *Amici* recently have filed two Petitions for Certiorari raising questions closely related to those presented by this case. *See* No. 98-189, *De Carbon v. General Motors Corp.*; No. 98-415; *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.* A Petition has also been filed in a third related case, No. 98-279, *Napleton v. General Motors Corp.* This Brief is presented to the Court out of time because these various petitions were not filed until the close of briefing on certiorari in this case. Counsel for Respondents have declined to consent to the filing of this Brief.

BRIEF AMICUS CURIAE

Amici file this Brief to advise the Court of three Petitions for Certiorari that are closely related to this case and to suggest that the Court straight-line the various related Petitions for consideration together at Conference. The question in this case is whether a district court's order dismissing a plaintiff's complaint in favor of arbitration is immediately appealable. The Ninth Circuit held that such an order was interlocutory and non-appealable. Pet. for Cert., No. 97-1895, at 4a-9a.

In No. 98-189, *De Carbon v. General Motors Corp.*, the Ninth Circuit applied its decision in this case summarily to hold that petitioners could not immediately appeal the district court's dismissal of their case. *See* Pet. for Cert., No. 98-189, at 19a. And in No. 98-415, *Seacoast Motors of Salisbury, Inc. v. Chrysler Corp.*, the First Circuit reached the same conclusion by expressly adopting the reasoning of both the Ninth Circuit in this case and the Seventh Circuit in *Napleton v. General Motors Corp.* *See* Pet. for Cert. No. 98-415, at 5a.

The First, Seventh, and Ninth Circuits all acknowledged a conflict with the Third, Sixth, and Tenth Circuits. *See Seacoast Motors,* 143 F.3d at 628 (acknowledging that Third, Sixth and Tenth Circuits "have determined that an order of dismissal accompanying an order favoring arbitration is appealable as a final decision, even if the proceeding is embedded"); *Napleton*, 138 F.3d at 1212 (7th Cir.) (2-1 decision) (acknowledging that "[b]oth the Tenth and Third Circuits have held that a dismissal in favor of arbitration is an appealable decision, even in an embedded proceeding"; citing also *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990)); *McCarthy*, 122 F.3d at 1243-45 (9th Cir.) (2-1 decision) ("*But see*" citation to decisions of Sixth and Tenth Circuits).

Amici suggest that the appropriate course in this circumstance is to relist this case, *De Carbon, Napleton,* and *Seacoast Motors* for consideration together at Conference. Although the questions raised by the four cases are quite similar, the cases themselves arise in a variety of factual settings. The fact that four cases are pending contemporaneously presents the Court with a unique opportunity to select the best vehicle to resolve the conflict among the circuits.

Respectfully submitted,

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